Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Petition for Declaratory Ruling to Clarify	)	
Provisions of Section 332(c)(7)(B) to Ensure	)	WT Docket No. 08-165
Timely Siting Review and to Preempt under	)	
Section 253 State and Local Ordinances that	)	
Classify All Wireless Siting Proposals as	)	
Requiring a Variance	)	

To: The Commission

COMMENTS OF MICHIGAN MUNICIPALITIES AND OTHER CONCERNED COMMUNITIES

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SUMMARY

These comments are submitted by municipal organizations representing the interests of all 1,775 units of local government in the State of Michigan - - which are the units of local government exercising the zoning authority in the Michigan - - plus other municipalities from across the country.

The CTIA Petition cannot be granted because Congress has deprived the Commission of the preemption authority which the CTIA seeks to have the Commission exercise. Specifically, 47 U.S.C. Section 332(c)(7) states that "Except as provided in this paragraph, nothing in this Act" shall limit the zoning authority of the local unit of government. The "nothing in this Act" language supersedes any claim that there is a basis elsewhere in the Communications Act of 1934 for Commission preemption authority.

The relief requested by the Petition is preemption, although CTIA attempts to dress it up as something else. As these Comments show, significant periods of time - - at least six months just to comply with state and Federal procedural requirements alone - - is needed for a significant number of cell tower zoning applications. These time periods can be appreciably longer depending on the unique facts of each case, for example, where additional information is needed from the applicant, where field tests are needed, or where the input of other agencies (such as State Historical Preservation Officers) is needed. The Commission is being asked to preempt local zoning laws by preventing municipalities from having the time needed to perform actions required under these laws. Congress has deprived the Commission of this authority.

Granting the petition would violate the Commission's Katrina backup power orders. In these orders the Commission generally required landline and wireless phone companies to provide backup power at cell sites and other key locations. The Commission did this because it determined that a "backup power rule was in the public interest" because "access to communications technologies during times of emergency is critical to the public, safety personnel" and other reasons.

However, on reconsideration of the Katrina backup power order the Commission found that the "threat to public health and safety" from the environmental, safety, and other concerns associated with backup power supplies (batteries or electric generators) was so "compelling" that it exempted cell companies from installing backup power supplies where doing so was "precluded by . . . state . . . or local law; [or the] risk to safety of life, or health."

Risks to safety, life, or health are often considered in zoning proceedings. Adequate time to consider them is essential. The amount of time will vary significantly with the specific case.

The Petition would severely limit and often prevent municipalities from considering and addressing these concerns or granting appropriate variances relating to them. The Commission has ruled that these concerns are significant enough to exempt cell companies from fully achieving the overarching national goal of disaster preparedness and assistance to first responders. The same reasoning prevents this Petition from being granted simply to advance the lesser goal of building cell towers a little faster.

The CTIA Petition's examples of the time periods for local approval of cellular towers misleadingly combine apples and oranges. Specifically, municipalities typically use a "tiered" approach in cell tower zoning such that towers are allowed as of right in industrial zones with increasingly stringent levels of scrutiny, procedure, and requirements as the zoning districts move up through commercial to residential to single family residential. Comparing, as CTIA does, the times for cell tower approval in an industrial zone to those for a historic district or single family residential area is meaningless.

In Michigan, zoning approval for most cell towers (outside industrial zones) by state statute requires a public hearing with at least 15 days published notice. The Commission needs to understand that for a significant number of municipalities it can easily take 30 calendar days (in rural areas with weekly newspapers 40 - 45 calendar days) to meet this "15 day" requirement, depending upon when a zoning application is filed relative to the frequency of publication of local newspapers, the newspaper's timing requirements to get notices published, and the timing and frequency of meetings of planning commissions (who typically meet monthly). This time period is essentially doubled if either (a) the initial approval by a planning commission is only a recommendation which then goes to the municipality's city council or equivalent for final action or (b) the planning commission actually issues zoning approvals, but its decisions can be appealed by any affected party (cell company, neighbors, etc.) to the municipality's board of zoning appeals, whose decision is then final. So for a significant number of Michigan municipalities it will take at least 18 weeks just to comply with state law procedural requirements (7 weeks at planning commission, 4 weeks allowed to file an appeal to Board of Zoning Appeals, 7 weeks at Board of Zoning Appeals).

Although the laws of other states vary in their specifics, they generally follow the same pattern. So, for the same reasons as in Michigan, in many cases the time frames to meet the minimum procedural requirements of applicable state and local laws in other states will be about the same as for Michigan.

Several Federal Courts of Appeals have issued decisions under Section 332(c)(7) requiring that there be a "sufficient explanation" of a municipality's cell tower zoning decision to allow meaningful court review and that such "written decisions" must be separate from the "written record" of the zoning proceeding. To assure compliance with these Court decisions, municipalities are now often using a two-step process to issue cellular zoning decisions. At the relevant meeting of the planning commission, city council, or the like they do not make a final decision, but instead direct the municipal attorney to prepare for consideration at their next meeting a written decision approving/disapproving the cell tower application, with some direction as to the reasons for approval/disapproval and the conditions which may be attached to it. Then at a subsequent meeting the planning commission, city council, or the like reviews the draft decision, modifies it if necessary, and (typically) adopts it.

Because many zoning bodies meet only monthly, complying with Federal procedural requirements (or assuring compliance, for Circuits which have not yet ruled on this point) injects another month into the process at each stage where zoning applications are approved.

Combing the preceding state and federal procedural requirements, the result is that for cell tower zoning applications, in a significant number of cases, approximately 27 weeks (6 months) is required to ensure compliance with the applicable procedural requirements of state and federal law. The time periods requested by the Petition do not allow compliance with these minimum procedural requirements.

In addition to minimum procedural requirements, significant additional time is often needed to review the application; address incomplete or erroneous applications; get answers to questions from the cell tower company; conduct field strength/balloon tests to determine whether a tower at the proposed height in fact is needed to provide the needed coverage; or get needed input and approvals from other bodies (such as historic preservation bodies) whose decisions may change the project, and thus need to be in hand before zoning approval is sought. On collocated towers additional time often is needed for the owner to bring the existing tower on the site into compliance with the conditions of its zoning approval, which is necessary before additional zoning approvals for the site are sought.

As to variances, the CTIA objections to them are incorrect. Congress in the Committee Report accompanying Section 332(c)(7) expressly addressed and approved variances and public hearings for cell towers. And far from being "unique" and burdensome, variances are one of the most common forms of zoning approvals which municipalities grant. The Michigan Municipal League and Michigan Townships Association want this Commission to know that in Michigan alone, municipalities grant at least 5,000 to 10,000 variances per year! Given that other states issue variances under similar procedures, the total number of variances issued per year nationwide is in the hundreds of thousands. They are not unique or burdensome as CTIA suggests.

Variances are used for a wide range of situations for fences, homes, shopping centers, buildings, towers, or the like. They can address matters from setback requirements and parking restrictions to approving major projects such as hospitals, shopping centers, or the like. In general they allow projects to proceed where (often due to unique circumstances) the project cannot completely comply with applicable zoning ordinances. Variances thus are not a restriction on cell towers, but provide for flexibility so that zoning approvals for more cellular towers (and many other types of projects) may occur than would otherwise. For example, if a cell tower proposed for a particular site exceeds applicable height restrictions, or due to a small lot sizes might violate setback requirements (so that if the tower falls, it would fall in adjacent property) the variance procedure allows a municipality to approve zoning for the cell tower in question.

The CTIA Petition in this matter is legally and factually unsound and cannot be granted.

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I. INTRODUCTION

These comments are submitted by the municipal organizations representing the interests of all 1,775 units of local government in the State of Michigan, as well as on behalf of other interested municipalities from across the country.

Specifically, as to Michigan these comments are submitted by the Michigan Municipal League and Michigan Townships Association, which together represent the interests of all the cities, townships, and villages in the State of Michigan. These are the units of local government which exercise zoning authority in the State of Michigan.

These comments are also submitted on behalf of specific municipalities from across the country, namely the City of Belding, Michigan, the City of Walker, Michigan, the City of Lansing, Michigan, the City of Denton, Texas, the City of Sierra Vista, Arizona, the Village of Great Neck

Plaza, New York, the City of La Crosse, Wisconsin, Cobb County, Georgia, and Coldwater Township, Michigan, or collectively "Michigan Municipalities and Other Concerned Communities".

The CTIA Petition in this matter is legally and factually unsound and cannot be granted.

II. THE COMMISSION LACKS CELL TOWER ZONING PREEMPTION AUTHORITY

Congress has taken away from the Commission any statutory authority to preempt local zoning of cellular towers and antennas, such as CTIA requests in its Petition. Section 704 of the Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act") added Section 332(c)(7) to the Communications Act of 1934. Section 332(c)(7) is titled "Preservation of Local Zoning Authority" and starts out by stating:

> "(A) General Authority. Except as provided in this paragraph nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction and modification of personal wireless service facilities." (emphasis supplied). Section 332(c)(7)(A).

"The Act" in the preceding provision is the Communications Act of 1934. Due to the phraseology "nothing in this Act" the local authority preserved by Section 332 supercedes any other claimed basis elsewhere in the Communications Act of 1934 for Commission preemption authority, including those bases (incorrectly) claimed by CTIA in its Petition, such as Section 201(b) of the Communications Act of 1934, 47 U.S.C. Section 201(b). So as to any matters within the scope of Section 332(c)(7) the Commission lacks the preemption authority the Petition asks it to exercise.

The matters within the scope of Section 332(c)(7) are "personal wireless service facilities." These are defined as facilities for the provision of "commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services", 47 USC Section 332(c)(7)(C)(i) and (ii), or in English, cell phone towers and antennas.

Finally, the removal of Commission preemption authority is spelled out in the Conference Committee Report on Section 704 of the 1996 Act[1], which states as follows:

> "Conference Agreement. The conference agreement creates a new Section 704 which prevents Commission preemption of local and state land use decisions and preserves the authority of state and local governments over zoning and land use matters . . . The conference agreement also provides a mechanism for judicial relief from zoning decisions that fail to comply with the provisions of this section. It is the intent of the conferees that other [than for certain RF matters] the courts shall have exclusive jurisdiction over all other disputes arising under this section. Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction or modification of CMS facilities should be terminated." Conference Committee Report at 207-208 (emphasis supplied).

Succeeding portions of the Conference Committee Report directly address - - and refute - - the CTIA claim that cellular facilities should get special treatment, with "one size fits all" timing requirements for local action on zoning requests. The Conference Committee Report states:

> Under subsection [332](c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision." Id. (emphasis supplied).

As set forth in the first portion of the Conference Committee Report quoted above, in the 1996 Act, Congress took the unusual step of requiring the Commission to terminate then pending proceedings where the Commission was considering preempting local zoning and other authority over wireless facilities. Then a year later (1997) when the Commission started three proceedings to preempt state and local authority on wireless and HDTV matters Congress responded in the

[1] Report 104-458. 104th Congress, 2d Session, January 31, 1996 ("Conference Committee Report").

confirmation hearings for then Chairman Kennard and other Commissioners with strong questioning and criticism.

The relief requested by the Petition is preemption, although CTIA attempts to dress it up as something else. As succeeding portions of these Comments show, significant periods of time - - at least six months just to comply with state and Federal procedural requirements alone - - are needed for a significant number of cell tower zoning applications. These time periods can be appreciably longer depending on the unique facts of each case: for example, where additional information is needed from the applicant, where field tests are needed, or where the input of other agencies (such as State Historical Preservation Officers) is needed. By preventing municipalities from having the time needed to do the job under local zoning laws, the Commission is being asked to effectively preempt such laws.

And CTIA asks this Commission to preempt the use of variances for cell towers, even though as noted above Congress has expressly addressed and approved the use of variances.

The Commission cannot grant CTIA's preemption request. The message from Congress has been unequivocal and repeated: the Commission lacks statutory authority to act on matters within the scope of Section 332(c)(7) and cannot preempt State and local authority zoning authority on cell towers.

In compliance with Congressional mandate, the Petition must be denied, and this proceeding must be terminated without any action by the Commission.

III. GRANTING THE PETITION WOULD VIOLATE THE COMMISSION'S KATRINA BACKUP POWER ORDERS

In response to Hurricane Katrina, the Commission in 2007 adopted its "Katrina Panel Orders" which, in general, require landline and wireless phone companies to provide backup power at cell sites and other key locations. See *Recommendations of the Independent Panel Reviewing the*

Impact of Hurricane Katrina on Communications Networks, Order, 22 FCC Rcd 10541 (2007) ("*Katrina Panel Order"*); and *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order on Reconsideration, FCC 07-177 (released October 4, 2007) ("*Katrina Panel Order on Reconsideration").* They were a Commission response to recommendations on ways it might "improve disaster preparedness, network reliability and communications among first responders such as police, fire fighters, and emergency medical personnel" in light of the "worst natural disaster in the Nation's history."[2]

In those orders, the Commission found that:

> "Access to communications technologies during times of emergency is critical to the public, public safety personnel, hospitals, and schools, among others. Therefore, because the benefits of ensuring resilient communications during times of crises are so great, the Commission determined that a backup power rule was in the public interest." [3]

However, the Commission also found that there were substantial environmental, safety and other similar concerns associated with backup power supplies - - either batteries or generators. The Commission described these concerns as follows:

> "Petitioners state that, in order to comply with the [backup power] rule [as initially adopted by the *Katrina Panel Order*], carriers would be required to maintain a large number of battery and fuel-powered generators at cell sites. Because these power systems contain lead, sulfuric acid, oils and flammable liquids, they are subject to a host of federal, state, and local environmental and safety laws that strictly limit their placement and use. They note that, at a multi-carrier site, compliance with the rule could require the addition of several thousand pounds of additional weight, which would implicate local building code limitations. Petitioners note that placement and operation of diesel generators raises environmental issues and implicate federal and state environmental laws are implicated by the rule. They state that state and local government laws and ordinances require permits before installing new diesel generators and issuance of such permits can be delayed while authorities negotiate to address concerns re: noise pollution, ventilation, fuel leakage,

[2] *Katrina Panel Order on Reconsideration* at paragraph 2.

[3] Id. at para. 23.

> etc. Petitioners argue that site leases that contractually limit the placement of such equipment will have to be renegotiated prior to installation.
>
> "Because several petitioners refer to the CTIA Petition [for Reconsideration of the *Katrina Panel Order*], we note that CTIA also noted that a rooftop location could expose the equipment to lightning or other weather conditions that could compromise the equipment, making it more susceptible to fuel leakage and fire; that the location of such equipment in a church steeple may not provide adequate ventilation; and that pollutants emitted by diesel generators have been identified as leading contributors to a variety of environmental and health problems." [4]

Elsewhere the Commission noted concerns regarding fuel tanks, especially regarding propane tanks for propane-fueled generators.[5] As is well known, propane tank explosions can be terribly destructive, rather like a bomb going off.

Therefore, upon reconsidering its backup power rule as initially adopted by the *Katrina Panel Order*, the Commission found the "threat to public health and safety" from these types of concerns to be "compelling."[6] As a result, in the *Katrina Panel Order on Reconsideration* the Commission expressly exempted cell phone companies from installing backup power supplies where doing so is "precluded by (1) federal, state, tribal or local law; [or the] (2) risk to safety of life or health" due to these types of environmental, safety and similar concerns associated with backup power supplies.[7] The Commission did this despite its overarching public safety goal of disaster preparedness and providing assistance to first responders.

The key for present purposes is that the types of environmental, safety and similar concerns that led to the exemption in the *Katrina Panel Order on Reconsideration* are the same types of

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[4] Id. at para. 24, footnotes 75 and 76 (citations omitted).

[5] Id. at para. 29 and footnote 88.

[6] Id. para. 25.

[7] Id. para. 25.

concerns that often come up in and are addressed by local zoning proceedings regarding cell towers and antennas. Because most new cellular towers and antennas have backup power supplies, the concerns are often exactly the same ones noted by this Commission.

For example, if a cellular antenna and associated backup power supply is proposed for the roof of a school or office building, many of the preceding concerns may come up in the zoning proceeding, such as:

- Structural concerns - - can the building bear the weight?
- Fire and safety concerns due to a generator and fuel tank
- Ventilation and environmental concerns related to the exhaust from diesel generators.

Some of these concerns may be addressed in proceedings by the applicant to get permits from the appropriate authorities under applicable building codes, fire and safety codes, and air pollution codes. But often such concerns are addressed in zoning proceedings as well, either in addition to permitting processes, or because the precise problem and issues presented are not adequately addressed by applicable codes. Therefore, zoning proceedings are often the forum where the applicable concerns are explored, addressed, and conditions addressing them imposed.

Alternatively, a municipality may require assurances or input from the relevant permitting authorities as to whether or how these types of concerns can be addressed. If such authorities indicate that the project will need a significant change or redesign then that needs to occur prior to seeking zoning approval. Otherwise the municipality in the zoning process will be asked to approve a project different from that which can be built, and a new zoning approval will have to be obtained to accommodate the changes, which is wasteful. Also, obtaining two zoning approvals will delay the project. But it takes time to get such assurances and input.

Very similar environmental, safety and related concerns apply to the actual cell towers themselves. Among these are such things as:

- Making sure that any cell tower is "set back" sufficiently from adjacent property lines and occupied structures so that if it falls, it falls on the property of the cell tower owner and does not fall on an occupied building;
- If setback is not sufficient, finding out whether the owners of adjacent property or adjacent buildings will agree to having a cell tower closer than set back requirements would ordinarily allow.
- Making sure the tower is strong enough to stand up through winter storms with major icing (in the north) or tornadoes or hurricanes (in the Midwest and south).

The determination of whether or not concerns of the preceding types are present, and if so their extent and how to address them, is different for each cell site. Because each cell site is unique, it can take significant time to investigate, address and resolve these concerns. The amounts of time will vary with each site and municipality, but will generally be more than the times requested in the Petition.

As discussed more below, far from being a barrier to cell towers, variances allow municipalities and cellular companies needed flexibility in appropriate situations to address environmental and safety concerns. For example, they can allow cell towers on sites where set back requirements adequate to prevent the tower from falling on adjacent property cannot be met, but other measures to ensure safety can be taken. And they allow similar flexibility to find solutions to other types of environmental and safety concerns.

If granted, the Petition would severely limit municipalities' ability to consider and address the environmental, safety and related concerns of the types described above.

The Commission found these types of concerns significant enough to exempt cell companies from fully achieving the goals of disaster preparedness and assistance to first responders following Hurricane Katrina. The same reasoning prevents this Petition from being granted simply to advance the lesser goal of getting cell towers built a little faster.

IV. TIME LIMITS

As discussed more fully below, in the CTIA Petition --1) The examples given of the times needed for cellular zoning decisions are misleading, because they combine "apples and oranges," --2) the timeframes for decision the Petition proposes do not comply with the times needed for compliance with (a) the procedural requirements for special land use permits under Michigan law (and the analogous provisions of the comparable laws of other states), or (b) procedural requirements of Federal Court of Appeals decisions interpreting Section 332(c)(7)(B)(iii)), and --3) the time frames do not recognize or accommodate the times needed to correct deficient applications, obtain needed information from the applicant, correct non-compliances by the existing tower on the site (on which collocation is proposed) so that it is brought into compliance with the conditions of its zoning approval, or run tests to determine such things as whether a shorter tower can provide needed coverage.

A. CTIA Information Misleading: Communities often use a "tiered" approach to zoning approval for towers. Towers in areas where they would be unobjectionable (e.g., heavy industrial areas) are allowed "as of right," with approval either not needed, or quickly provided administratively. For example, approvals for cell towers allowed "as of right" are often issued by a city official without any public notice or hearing upon the official making sure minimal requirements are met.[8] Often such approvals are issued in a few days to two weeks.

[8] For example, making sure the property in question is in compliance with the conditions of

By contrast, towers proposed for commercial or residential areas require a higher level of scrutiny and approval, and consequently a more detailed application, and (by state statute) public notice and a public hearing. As is set forth below, antennas and towers in commercial and residential areas in Michigan typically require a "Special Land Use Permit" approval, where compliance with state-mandated procedures and 42 U.S.C. § 337(c) often take well beyond the 75 days requested in the Petition.

The timeframes given by the CTIA in the examples set forth in its Petition give absolutely no indication of which type of area - - industrial on the one hand, or commercial and residential on the other - - and consequently what type of zoning approval was involved in the examples it provides. By inspection however, the CTIA has apparently combined the typically short timeframes for "as of right" type approvals for cell towers in industrial zones (described below) with the much longer ones for those in residential or other areas requiring a higher level of scrutiny and a more detailed review. This "apples and oranges" combination is disingenuous and misleading.

An analogy would be stating that the shortest time to obtain a "license" to operate a "radio transmitter" from this Commission is X days, and thus TV station licenses should be issued that quickly, without separating such licenses into the appropriate categories -- ham radio, public safety categories, commercial radio, television, or the like. In both sets of examples, the comparison is meaningless because it combines different types of approvals with different substantive and timing requirements.

The next sections of these Comments correct this error by setting forth first, (a) the times required to comply with just the procedural requirements of state and Federal law for most cell

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any existing zoning approvals for it, making sure there are no historic preservation issues, making sure the permanent parcel number (unique ID number) for the property in question is correct, and so on.

tower zoning applications in residential and commercial neighborhoods, followed by (b) the time frames frequently necessary for municipalities to get complete cell tower applications, obtain the information and conduct the tests necessary to properly evaluate such applications. Such time frames often are well beyond those proposed by the Petition, vary substantially with the facts of each application, and are largely within the control of the applicant.

B. Procedural Requirements: As just noted, cell towers are frequently allowed in areas where they are clearly unobjectionable -- such as in industrial areas -- effectively as of right. In such cases needed zoning approvals are typically issued quickly.

1. Notice and Hearing Requirements of State Law: In Michigan most other cell towers are approved by what the Michigan Zoning Enabling Act, MCL § 125.3100 and following, terms a "Special Land Use Permit". The Zoning Enabling Act applies to all zoning matters in Michigan. It requires (1) a public hearing on all such Special Land Use Permits with (2) a minimum of fifteen (15) days published notice of the hearing. MCL §§ 125.3103(3), 3502. This notice and hearing requirement thus applies to all municipalities and all Special Land Use Permits in Michigan.

What this Commission needs to know is that it can easily take thirty calendar days (in rural areas with weekly newspapers, sometimes 40-45 calendar days) to meet this "15 day" notice requirement, depending on when an application is filed relative to the frequency of publication of local newspapers, their timing requirements to get notices of hearings published, and the timing and frequency of the meetings of planning commissions/city councils, and the like. And this time period is essentially doubled if either (a) the initial approval by a municipal "planning commission" is only a recommendation which then goes to the municipality's city council or equivalent for final action, or (b) the planning

commission's action, although otherwise final, is appealed by any affected party (cell company, neighbors, etc.) to the municipality's Board of Zoning Appeals. Specifics on this are set forth below.

The timing and logistical constraints involved in noticing a matter for a public hearing typically involve the following:

- First, the lead time required by the local newspaper to get something published (roughly analogous to the lead time this Commission faces in getting items published in the Federal Register). This often is three to ten days prior to publication.
- Second, the actual delay in getting the notice published. Especially in more rural areas where the applicable newspaper of record is a weekly, it can easily take two weeks before a notice can get into a newspaper. For example, if a zoning application were filed the day after a weekly newspaper is published, and there is a seven-day notice requirement to get into the next issue, it will be two weeks before a notice comes out. And this ignores the internal processing time at the municipality necessary for it to receive and evaluate the application and get a hearing scheduled.
- Third, the fifteen days notice required by the Michigan Zoning Enabling Act has to occur. The problem here is that planning commissions (which often are the principal or initial level of approval for special land use permits) in a majority of communities meet only monthly (or sometimes less frequently). If the first regularly scheduled planning commission meeting occurs on the fourteenth day following publication of the notice of a public hearing, then the hearing on the

zoning application cannot be considered at that meeting, and instead must be deferred to the next scheduled meeting of the planning commission, which is usually at least a month away.

When you combine the (1) statutory fifteen-day notice period with, (2) newspaper publication schedules and requirements, (3) the actual meeting schedule (dates on which meetings occur) of the municipality and (4) any administrative necessary time to receive and review a filing and then meet applicable scheduling requirements, the result is that (5) in a significant number of cases it will take up to seven weeks minimum from the date of filing until the statutorily required public hearing can occur. This is especially the case in smaller communities where newspapers publish only weekly and the municipality's planning commission meets infrequently. These time periods occur simply due to how the timing of an application falls relative to all these scheduling factors.[9]

The preceding time frame is for the initial decision by a planning commission. But under Michigan law, (1) often a planning commission does not issue a formal zoning approval but instead only makes a recommendation to a city commission or township board; or (2) if the planning commission in fact is authorized to grant zoning approvals, its decision may be appealed (such as by a dissatisfied cell company or neighbor) to the municipality's Board of Zoning Appeals. MCL § 125.3601 and following. In either case (recommendation, appeal) the preceding time periods are essentially doubled for the same kinds of reasons as apply at the planning commission level - - the fact that the appellate

[9] As discussed herein, this is the absolute minimum time frame necessary to meet the statutory public notice and hearing requirement. It does not include the time periods (discussed below) necessary to actually evaluate and process an application, receive information from other interested parties, require the completion of deficient applications, or conduct field tests to see (for example) whether a shorter tower would suffice.

body often only meets monthly, to comply with any notice requirements for a public hearing before that body (for example, so that a cell company can make its case why any rejection or conditioning of any application was incorrect, for neighbors to make their case why an approval of a cell tower should be reversed, and – in the latter case – for the cell company to defend any approval), the timing of the appeal relative the appellate body's meeting schedule (and when the agenda for its meetings is set). In addition, under Michigan's Zoning Enabling Act the time period for appeals from a planning commission to a Board of Zoning Appeals is set by each municipality. MCL § 125.3604(2). In general, the time municipalities allow for the filing of such appeals is no more than four weeks - - and this time period has to be added to the preceding ones.

The result is that in a significant number of cases the minimum times necessary to comply with the procedural requirements of the Michigan Zoning Enabling Act can be more than eighteen weeks (including 7 weeks at planning commission, 4 weeks for an appeal to be filed, 7 weeks at Board of Zoning Appeals) in the many situations where the relevant municipal bodies meet only monthly, the local newspaper of record publishes only weekly, and the timing of applications and appeals relative to municipal meeting schedules is such that the applicable time periods are extended.[10]

2. <u>Procedural Requirements of Federal Communications Act</u>: To assure compliance with the Communications Act of 1934 - - and how cellular companies contend that Act must be interpreted - - many municipalities will not make a decision on a cell tower

[10] In a majority of cases the minimum time periods for compliance with procedural requirements will be less, such as where the newspaper publishes daily, municipal bodies meet frequently, and the timing of an application is opportune relative to applicable meeting schedules. But in a significant number of cases the longer, eighteen-plus week period will be the minimum needed, for the reasons indicated.

zoning application at the meeting at which a public hearing on the application occurs. Instead, the decision will occur at a subsequent municipal meeting. This occurs due to the following.

47 U.S.C. § 332(c)(7)(B)(iii) requires that "any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record." The courts have not settled on a uniform standard as to what this means. APT Pittsburgh v. Penn Township, 196 F.3d 469, 474 n.4 (3d Cir. 1999); cases collected and discussed in Southwestern Bell Mobile Systems v. Todd, 244 F. 3d 51 at 59 (1st Cir. 2001) ("Southwestern Bell Mobile"). Cellular companies argue that a "decision . . . in writing" must include findings of fact and an explanation of the decision, essentially like a court decision. See, e.g.--cases cited in Southwestern Bell Mobile, at 59. Many, but not all, of the Federal Circuit Courts of Appeal have rejected this claim, and the ultimate decision-maker on this, the Supreme Court, has not faced this issue. See e.g. USCOC of Greater Iowa v. Zoning Board of Adjustment of City of Des Moines), 465 F.3d 817, at 824 (8th Cir. 2006) ("The [Communications Act] requires only that the Board's final decision be in writing supported by substantial evidence in a written record, not that every necessary finding be in the written decision.")

One of the most extensive discussions of the written record/written decision requirement to date is by the First Circuit Court of Appeals in Southwestern Bell Mobile, supra. In that case, the court rejected the cellular industry argument that under 47 U.S.C. § 332(c)(7)(B)(iii) local zoning decisions must contain formal findings of fact and conclusions of law as having "no basis in the language of the Act" and contrary to sound policy because

local zoning boards "are primarily staffed by laypeople" from whom it is unrealistic "to expect highly detailed findings of fact and conclusions of law." Id. at 59. However, the court made two rulings pertinent to the Petition and this proceeding:

- First, it required that a municipality's written decision "must contain a sufficient explanation of the reasons for the permit denial to allow a reviewing court to evaluate the evidence in the record supporting those reasons." Id. Some other courts have agreed with this standard. New Par v. Saginaw, 301 F.3d 390, 395 (6th Cir. 2002) ("Saginaw"); Metro PCS v. San Francisco, 400 F.3d 715, 722 (9th Cir. 2005) ("San Francisco"); and
- Second, it required that under 47 U.S.C. § 332(c)(7)(B)(iii) a municipality's "written decision" must be separate from the "written record" of the proceeding. Id. at 60.

  The courts are now addressing the issue of when a "written decision" is sufficiently separate from the "written record" requirement to satisfy cases such as Southwestern Bell Mobile, Saginaw and San Francisco. See, for example, the discussion of this point in Cellco Partnership v. Franklin County, __ F. Supp. 2d __ (E.D. Ky 2008) 2008 WL 1790135, slip opinion at 4-5.

To assure compliance with these Federal Court of Appeals decisions requiring a "sufficient explanation" of a municipality's decision, and that the "written decision" must be separate from the "written record" of the proceeding, municipalities are now often using a two-step process to issue cell tower zoning decisions. At the first meeting where the planning commission, city council or the like is ready to make a decision, they do not adopt a decision. Instead they direct staff (or the municipal attorney) to prepare for consideration at their next meeting a decision approving/disapproving a cell tower zoning application,

usually with some direction as to the reasons for approval/disapproval or conditions which may be attached to an approval. Then at its next meeting, the planning commission, city council or the like reviews the draft decision, modifies it if necessary and generally adopts it. As an example, a planning commission or city council may direct staff to prepare a decision for their consideration at their next meeting (1) approving a cellular tower application over the objection of neighborhood residents, (2) but with certain conditions (restrictions on the number of trees that can be removed, requiring landscaping around the cell tower enclosure, requiring a less intrusive type of tower (e.g., unipole) or requiring a certain painting scheme or "camouflaging" of the tower so as to make it less visible), and (3) explaining the reasoning for the decision.

This process sufficiently documents the reasons for the municipality's decision in compliance with 47 U.S.C. § 332(c)(7)(B)(iii), makes sure the "written decision" is separate from the written record, and provides good assurance of compliance with 47 U.S.C. § 332(c)(7)(B)(iii) as it is being interpreted by the courts.

For present purposes, however, such compliance with 47 U.S.C. § 332(c)(7)(B)(iii) injects an additional procedural step, and hence additional time, into the time periods necessary to comply with the procedural requirements of applicable law for municipalities ruling on cell tower zoning requests. Specifically, it means that the minimum time for such a ruling must include the time period for the next scheduled meeting of the municipal body in question.

In Michigan planning commissions typically meet on a monthly basis. If a planning commission is empowered to grant zoning applications (not just make recommendations), an additional month or roughly 4.5 weeks thus must be added to the minimum time necessary

to comply with the procedural requirements of the Michigan Zoning Enabling Act in order to assure compliance with 47 U.S.C. § 332(c)(7)(B)(iii). Similarly, if a cell tower zoning decision of a planning commission is appealed to a municipality's Board of Zoning Appeals (which also often typically meets monthly), an additional 4.5 weeks must be added to the minimum time period necessary for that body to comply with state law.

3. <u>Procedural Requirements -- Conclusion</u>: This Commission should understand that compliance with the procedures described above protect the cell tower applicant as much as they protect neighborhood residents. The public hearings allow the applicant the opportunity to respond to and sometimes ameliorate neighbors' objections. A carefully worded decision adopted by a city council (combined with adherence to the procedural requirements of state and local law) minimizes the chance of a decision approving a cell tower from being overturned by persons who object to cell towers.

The preceding facts show that in many Michigan municipalities the minimum times needed to allow comply with just the applicable procedural provisions of Michigan and Federal law are:

- Planning commission level
    - 7 weeks to comply with Michigan Zoning Enabling Act
    - 4.5 weeks to assure compliance with 47 U.S.C. § 332(c)(7)(B)(iii)
- Board of Zoning Appeals level
    - 4 weeks allowed to file an appeal
    - 7 weeks to comply with procedural requirements at that level
    - 4.5 weeks to assure compliance with 47 U.S.C. § 332(c)(7)(B)(iii)

The result is that for many cell tower zoning applications in Michigan, approximately twenty-seven (27) weeks is thus required to assure compliance with the applicable procedural requirements of state and Federal law. Although the laws of other states vary in their specifics, they generally follow the pattern set forth above, and so for similar reasons, in many cases the time frames to meet the minimum procedural requirements of applicable law will be about the same as those in Michigan.

C. Time Needed to Complete Application, for Information and Tests: The preceding portion of these comments have addressed the minimum time period needed to comply with procedural and notice requirements of applicable law. But significant additional time is often needed to address incomplete applications and address an array of factual issues specific to the proposed cell tower site in question. This corresponds exactly with the provisions of 47 U.S.C. § 332(c)(7)(B)(ii) and statements in the accompanying Committee Report that the time period for action by municipalities on cell tower zoning matters varies with the "nature and scope" of "each request" and thus the individual circumstances of each case.

1. Incomplete or Erroneous Applications: Municipalities frequently find that the zoning applications filed by cell tower companies are erroneous or incomplete. For example, they may recite that the tower in question is not in or near a historic neighborhood or not on a historic building when, in fact, the opposite is the case. Sometimes the information (exhibits, maps, diagrams, photosimulations from nearby locations showing what the tower might look light when built) required to be submitted with an application are not included. Some specific illustrations in this regard are set forth below.

In general, municipalities often attempt to work with the applicant to bring the application into conformity with zoning requirements so as to have a complete package,

with erroneous information corrected. The experience is that this can take significant time - - from several weeks to five or six months - - especially given the fact that cell tower companies are often slow to respond to requests to supplement or complete their filing or to provide needed information. In part, the slow responses appear to be a result of cell companies subcontracting out their site acquisition, leasing, and local approval work to subcontractors who are simply not very efficient, or lack sufficient "clout" to obtain needed information from the cell company. Another frequent cause of delays is that the person at the subcontractor responsible for the zoning application leaves, does not notify the municipality of this (or have another person take over this responsibility), and as a result municipal inquiries go unanswered for long periods of time. Whatever the reason, the result is the same – municipal deadlines go by while awaiting necessary information from the cell company.

2. <u>Basic Questions</u>: Once an application has been made and is complete, often a municipality will have questions for the applicant on a number of basic issues, such as why the company contends a tower is needed, why the specific location for which approval is sought is necessary, and whether there are alternative solutions. For example, on alternative solutions, a municipality will frequently ask (a) if there are nearby towers or multistory buildings, whether the proposed antenna could be located on them, (b) more generally, what alternative sites or solutions were considered (and why were they rejected or not pursued), (c) would two antennas in alternate, more acceptable locations suffice, in lieu of the one antenna for which approval is sought, (d) would a tower at a lower height than that being proposed provide adequate coverage, and (e) particularly in residential areas, why the coverage need in question cannot be filled by means of a distributed antenna system (DAS)

mounted on utility poles or near the ground, requiring no towers.[11] These are legitimate inquiries, but the experience in Michigan and elsewhere is that cell tower companies are typically very slow in responding to such requests - - it often takes weeks or months to get responses.

3. Field Strength/Balloon Tests: Sometimes municipalities find the need for a "field strength test" to determine whether a tower at a lower height, in fact, will provide the coverage needed. And sometimes "balloon tests" are needed to see how visible a tower at a certain height will be. Each takes time.

On field strength, cellular companies often provide "coverage maps" that are basically computer-generated predictions of the signal strength in the surrounding area from the proposed antenna, plus predictions of the signal strength of the company's neighboring antennas. In general such "coverage maps" attempt to show how a proposed antenna or tower will fill a "gap" in coverage.

But such maps (like a map of tomorrow's or next week's weather) are only predictions based on computer models that are not completely accurate - - they over simplify matters, often are based on out-of-date information (with respect to buildings and trees), and cannot take into account all the particulars of the actual terrain, buildings, and foliage in the area and the like which will affect the actual propagation of RF signals at the high frequencies used by cellular devices.

As a result, municipalities sometimes will have a "field strength test" run where a small crane is taken to the proposed tower location and lifts a temporary antenna into the air.

[11] Such systems basically consist of a number of small wireless antennas that are put on utility poles or light poles, or located along the streets (often concealed as fire hydrants or the like).

Field strength measurements are taken in the area with the antenna at various elevations (e.g. 120 feet above ground level, 110 feet, 100 feet and so on).

Often the result of such tests show that an antenna at a substantially lower height than that proposed will provided needed coverage.

Another test sometimes used is a "balloon test," where a large balloon on a string (similar to a weather balloon) is put in the air at the height of the proposed tower to see how visible an antenna at that location might be. Based on this, the municipality has better information on which to make a decision - - for example whether visibility is an issue, and if so, whether it is a serious enough issue to consider having the tower camouflaged as a tree, tower, or other vertical structure appropriate to the area.

The key is that field tests and balloon tests take time to set up and conduct. Engineers, temporary cranes, temporary antennas, field strength meters, and the personnel involved are not available on a moment's notice. Such tests are usually coordinated with the schedules of both owner of the parcel of land in question,[12] the cellular company, the municipality, and RF consultants for the municipality. In northern parts of the U.S., such tests may not be possible during winter months due to inaccessibility caused by snow and ice.

4. Non-Compliance with Prior Zoning Conditions: In many communities, any zoning applicant has to show that the property in question is in compliance with the conditions of prior zoning approvals for that property before a new zoning approval request for that property can proceed. This assures the obvious - - that the property in question is in

[12] Cellular companies rarely own the land on which towers are located. Instead they typically lease such land from a third party, with the lease structured as an option to lease until all needed regulatory approvals are obtained.

(or comes into) compliance with past zoning approvals before any new ones are granted.[13] Sometimes such a showing is accomplished by the applicant having to submit a certificate of compliance with its application, in other cases it may be by municipal inspection.

Frequently in the case of cell towers - - especially collocation applications - - the experience of some Michigan municipalities is that the applicant will "forget" to provide the required certification of compliance, typically because some of the conditions attached to the zoning approval for the original tower on the site were not complied with. For example, the tower on which collocation is proposed may not be painted the correct color, antennas may be of a very different type and size than those approved, they may be at the wrong elevation, required landscaping may not have been put in, required camouflaging for a roof mount antenna (such that it is not visible from the street) may not have been installed, and so on.

When the municipality asks for the required certificate - - or a municipal inspection reveals non-compliance - - there often is a delay of from a few weeks to five or more months in providing it, while the original carrier attempts to come into compliance with the conditions of its original zoning approval.

5. Historic Preservation Approvals: Historic preservation is a significant consideration in the zoning process. Many communities as a part of the zoning approval process require the applicant to indicate (in substance) whether the proposed project is in or near a structure or district "included or eligible for inclusion in the National Register of Historic Places." The Federal courts have expressly recognized that an undue impact on historic places is a valid reason to deny cell tower zoning approval. See, e.g. AT&T

[13] The Commission has had recent experience with its licensees not complying with license conditions. Thus, in the Sirius-XM merger, that merger was approved concurrent with Consent Decrees requiring the payment of over $19 million as a result of the companies' non-compliance with Commission regulations governing FM modulators and terrestrial repeaters.

Wireless PCS, Inc. v. Winston-Salem Zoning Board of Adjustment, 172 F.3d 307, 315-316 (4th Cir. 1999).

More generally, under Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, all Federal agencies have to take into account the effects of their actions on "historic properties," which are "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places." 36 CFR § 800.16(l)(1). As to cellular antennas, this means in substance that the relevant State Historic Preservation Officer has to be consulted, the potential adverse effects of the antenna considered, and mitigation measures (if any) considered. It is important that this Federal historic preservation process be completed prior to seeking local zoning approval - - if the State Historic Preservation Officer determines that there is no adverse effect under Federal law, that aids the local zoning process. Conversely, the municipality needs to be aware of any mitigation measures proposed or required by the State Historic Preservation Officer before proceeding with its consideration of the zoning application, as otherwise mitigation measures will change the application.

Again, often cell tower zoning applicants will check the box indicating that the proposed antenna or tower is not in or near a historic structure or area, when in fact the antenna or tower is in or near such an area. When the municipality catches this, it typically requires approval or "clearance" from the State Historic Preservation Officer prior to proceeding with local zoning approval. Such approval often takes the form of a clearance letter, which may approve the antenna or tower outright, may impose conditions, or may disapprove it entirely.

Such State Historic Preservation Officer approval often takes from a few weeks (if the applicant started the State Historic Preservation Officer approval process prior to filing the zoning application) to six or more months. For present purposes, the key is that failure of the zoning applicant to obtain needed State Historic Preservation Officer approval prior to submitting a cell tower zoning application delays the local zoning approval process.

6. Other Approvals: Historic preservation approvals are just one example of how the local zoning process needs to be and can be delayed while the municipality or applicant obtains approvals or information from other agencies or authorities whose decisions may change the project appreciably. Prior portions of these comments have noted the same types of issue as to code and permitting authorities, especially for cell towers with backup power (which is most new cell sites these days). In these types of cases it would not only be wasteful to proceed with the zoning process if such input from other entities is likely to change the project, such that any zoning approval would have to be redone. But it would also violate the Congressional prohibition on preempting local zoning authority.

D. Time Needed, Conclusion: These comments show how in Michigan the procedural requirements alone of state law and the Federal Communications Act often will require a minimum of six months for cell tower zoning applications. In many cases, the minimum time periods for compliance in other states will be comparable.

These comments also show how additional time often is needed to address the substance of such applications. In general, such additional time adds to the six months, because an application needs to be complete, basic questions answered, tests run and State Historic Preservation Officer clearances obtained prior to holding a public hearing on the project. Otherwise there is a substantial risk that the project will change sufficiently that an additional hearing will be required.

How much additional time is needed varies greatly. It depends on each unique application, with the amount of time needed often largely within the control of the cellular applicant. For example, the time needed to correct incomplete or erroneous applications, obtain State Historic Preservation Officer clearance and the like is all within the control of the applicant. If the applicant submits a complete and correct application in the first instance, and obtains a State Historical Preservation Officer clearance before making a local zoning request, no additional time is needed on these issues. Similarly, the applicant controls the amount of time needed to respond to requests from the municipality by the speed of its response. For field strength or balloon tests, the applicant has some but not complete control over the time needed. And the applicant can influence the owner of an existing cell tower on the site to promptly comply with the conditions applicable to the zoning approval for that tower.

In all these instances the fact that the cell tower application will be delayed until the applicant provides requested information, obtains historical clearances, arranges for a field strength test or the like is a powerful incentive for the applicant to promptly take care of these items. Imposing rigid time deadlines for action, such as the CTIA requests, encourages applicants to simply stall and "run out the clock" so as to avoid taking these actions.[14]

In summary, the time needed by municipalities to act on cell tower zoning requests is (1) at least six months to comply with procedural requirements of applicable law, plus (2) often additional time, largely determined by the applicant, and which varies with the specifics of each application. The time periods proposed by the CTIA Petition fail to recognize, address or comply with these realities, and thus the declaratory ruling it requests cannot be granted.

[14] This goes to the heart of the zoning application process, and shows that the CTIA Petition with rigid shot clocks would accomplish an effective preemption of local zoning authority, in violation of the express language of Section 332(c)(7), discussed above, preserving such authority. Hence the Petition cannot be granted.

V. VARIANCES

The CTIA Petition asks this Commission to prevent the granting of cell tower zoning approvals by means of "variances" because such variances are "unique," burdensome, and involve public hearings.

These claims are simply incorrect.

A. Variances are Granted by the Thousands Each Year: In fact, variances are one of the most common forms of zoning approvals which municipalities grant. The Michigan Municipal League and Michigan Townships Association want this Commission to know that in Michigan alone municipalities issue at least 5,000 to 10,000 variances per year. The actual number is likely higher. Given that other states issue proportionately similar numbers of variances, depending on the size of the state in question, the total number of variances per year issued nationwide is in the hundreds of thousands - - well in excess of the number of cell towers currently in existence!

B. Variances are Used for a Wide Range of Projects and Situations: Variances are not issued solely for "landfills, cemeteries, and power plants" as the CTIA Petition contends. In fact, as the preceding numbers suggest, they are used for a wide range of situations. In particular, variances are typically granted for:

- Setback requirements -- a proposed fence, house, shopping center, building, tower or other project is too close to an adjacent property line and thus needs a "variance" from the otherwise applicable "setback requirement."[15] Such "dimensional" variances from front yard, side yard, or rear yard setback requirements are frequently granted.

[15] "Setback" requirements, as the name suggests, are requirements in zoning laws that the structure or item in question be "set back" X feet from an adjacent property line. For example, if a zoning ordinance requires that no building, structure or fence be closer than ten feet from a property line, a variance is required to build a fence or building eight feet from the property line.

- Parking -- variances are frequently granted for parking requirements. A zoning ordinance may require a store or other facility attracting visitors to have a certain amount of parking. A "variance" may be necessary either to accommodate a lesser amount of parking then that ordinarily required by the zoning ordinance or to allow it to be at a different location than the zoning ordinance requires (in front or in a side yard rather than, for example, behind a building if that is what the ordinance requires) or to eliminate the requirement altogether if it can be shown that there is adequate parking nearby.
- On a much larger scale, variances are sometimes obtained for major projects such as hospitals, shopping centers, strip malls, or the like where due to unique circumstances a project in question cannot completely comply with the applicable zoning ordinance. Just as with cell towers, the variance process for these larger projects may include setback requirements or tradeoffs of a facility's height, mass, camouflaging, landscaping, or the like to allow a project to proceed while minimizing the adverse effect on the neighborhood and community.
- Variances are often required for changes in "nonconforming uses." These are buildings or structures that predate the current zoning ordinance (and today would not be allowed under it) but are "grandfathered." An example would be a hospital or car dealer in an area now zoned solely for residential use. Changes to the exterior of these facilities, their grounds or their use require a variance.

C. <u>Variances Are Not Burdensome</u>: The variance process in Michigan does not have special hearings that are "unduly burdensome" as the CTIA Petition suggests. Instead, the same public hearing requirement with a fifteen-day notice provision that applies to the Special Land Use

Permit required for most cell towers also applies to variances. MCL §§ 125.3604(4), 3103. Stated otherwise, in Michigan variances have the same public hearing requirement as all other cell tower applications, excepting those towers which the local zoning ordinance approves "as of right," as discussed above.

D. Congress Has Approved Variances: Contrary to the suggestion of CTIA, Congress has expressly addressed and approved the use of variances involving public hearings for cell towers. Thus, in the Conference Committee Report accompanying Section 332(c)(7) Congress said:

> "Under subsection [332](c)(7)(B)(ii), decisions are to be rendered in a reasonable period of time, taking into account the nature and scope of each request. If a request for placement of a personal wireless service facility involves a zoning variance or a public hearing or comment process, the time period for rendering a decision will be the usual period under such circumstances. It is not the intent of this provision to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision." Conference Committee Report at 208 (emphasis supplied).

CTIA's objection to variances generally, or because they involve hearings, is thus misplaced.

E. Variances Allow More Zoning Approvals for Cell Towers: Variances allow zoning approval for more cellular towers than might otherwise occur. In the words of Michigan's Zoning Enabling Act, variances are allowed where there are "practical difficulties" or "unnecessary hardship" under the "the strict letter of the zoning ordinance." MCL § 125.3604(7). A municipality may grant a variance "so that the spirit of the zoning ordinance is observed, public safety secured, and substantial justice done." Id.

Thus if a proposed cell tower for a particular site exceeds applicable height restrictions, or due to a small lot size might violate fall radius requirements in the zoning ordinance (a requirement that a tower be set back from the lot line a distance at least equal to the height of the tower, plus a safety factor, so that if the tower falls, it does not impinge on neighboring properties) the variance

process allows the cell tower to go forward. In the case of a height variance, the cell company may show that the additional height is needed. In the case of a fall radius requirement, the cell company may show that (a) the tower is designed with a "weak point" part way down, so that if it falls, it will not be the full height of the tower that is falling, or (b) the neighboring property is unoccupied, or (c) the neighbors have no objection.

F. Variances -- Conclusion: Thus in virtually all respects the CTIA Petition regarding variances is incorrect: Variances are one of the most common forms of zoning approvals granted in the nation, they are used for a wide range of projects, have no more burdensome hearing requirements than other projects, and in fact allow local zoning approval for more cellular towers than would otherwise occur. And Congress in the Committee Report expressly addressed and approved them.

VI. CONCLUSION

For the reasons set forth above, the CTIA Petition must be denied.

Respectfully submitted,
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